



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20 -4 -2006

CORAM:

THE HONOURABLE MR.JUSTICE P.K.MISRA
AND
THE HONOURABLE MR.JUSTICE R.SUDHAKAR

L.P.A.No.21 of 2000

P.Panneerselvan

.. Appellant/ Defendant

vs.

1. A.Baylis (deceased)
2. Sarojini
3. Auspin Anburaj
4. Marvin Baylis

(Respondents 2 to 4 brought on record as LR's. of
the deceased sole respondent - vide Order of Court
dated 29.9.2005 made in C.M.P.No.15517 of 2005)

..Respondents/ Plaintiff

Letters Patent Appeal under Clause 15 of the Letters Patent
against the judgment and decree dated 14.12.1999 in A.S.No.600 of
1987 on the file of this Court.

For appellant: Mr.T.R.Rajagopalan, Senior Advocate for
Mrs.Chitra Sampath

For respondents : Mr.K.V.Ananthakrishnan for RR-2 to 4

JUDGMENT

R.SUDHAKAR, J.

The appellant before this Court is the defendant in the
Original Suit in O.S.No.156 of 1984 before the Sub-Court, Madurai.
The present L.P.A. is against the judgment and decree of the
learned single Judge in A.S.No.600 of 1987, confirming the
judgment and decree passed in O.S.No.156 of 1984 on the file of
the Sub-Court, Madurai. The parties will be referred to as they
are arrayed in the Original Suit.

2. The plaintiff has filed the suit for specific performance
of contract to execute the sale deed in respect of 1 acre 30 cents
in R.S.No.174/5 in Uthagudi Village in Madurai District or in the
alternative, for recovery of a sum of Rs.1,00,000/- with 18%
interest from the defendant.

3. The case of the plaintiff is as follows:

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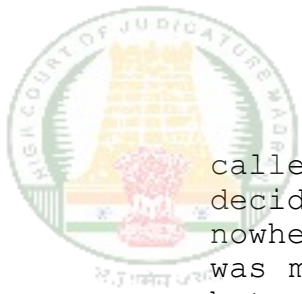
The plaintiff and the defendants were good friends. The
defendant was engaged in development and sale of land and he is



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the owner of the land in R.S.No.174/4 measuring 60 cents, R.S.No.174/5 measuring 1 acre 30 cents in Uthangudi Village, Madurai District. The defendant intended to purchase further extent of 4 acres 15 cents from the same village adjacent to the abovesaid lands in R.S.No.175/2 measuring 69 cents, R.S.No.174/2 measuring 1 acre 31 cents, R.S.No.175/1 measuring 74 cents, R.S.No.174/3 measuring 85 cents and R.S.No.173/5 measuring 58 cents, for which, some advance have been already paid and for the execution of the said sale, the defendant required further funds. In view of the above, the defendant offered to sell 1 acre 30 cents either out of the land bearing R.S.No.174/5 or an equal extent of 1 acre 30 cents out of 4 acres 15 cents which was proposed to be purchased and therefore, the defendant wanted the plaintiff to pay the entire sale price of Rs.1,00,000/-. The plaintiff further states that a sum of Rs.1,00,000/- as agreed was paid by the State Bank of India Cheque dated 10.10.1983 and the defendant received the same and encashed the cheque. It is also stated that the defendant represented to the plaintiff that the land to an extent of 4 acres 15 cents would be purchased within a few months and the sale deed will be executed in favour of the plaintiff within a period of three months and that the defendant has executed an agreement in favour of the plaintiff on 10.10.1983. However, since the defendant did not purchase 4 acres 15 cents, the plaintiff called upon the defendant to execute the sale deed in respect of R.S.No.174/5 measuring 1 acre 30 cents, since he had already paid the full sale consideration of Rs.1,00,000/- to the defendant. The defendant was postponing the execution of the sale deed on some pretext or the other. That on 14.12.1983, the defendant refused to execute the sale deed in favour of the plaintiff in a personal meeting held on that day. The plaintiff was always ready and willing to get the sale deed executed in his favour and that the defendant was evading the sale. Therefore, the plaintiff issued the lawyer's notice to the defendant on 16.12.1983 and a paper publication was made on 17.12.1983. The defendant sent a reply dated 27.12.1983 refuting the contentions of the plaintiff and the rejoinder was sent by the plaintiff on 5.1.1984. Hence, the plaintiff was constrained to file the suit for specific performance of the contract of sale. The plaintiff also made a prayer that in the event of the Court finding that the plaintiff was not entitled to the specific performance of the contract, the plaintiff pleaded that he was entitled to a sum of Rs.1,00,000/- paid by him to the defendant. The plaintiff also prayed for interest @ 18% by way of damages to him from 10.10.1983 on the abovesaid sum of Rs.1,00,000/-. The schedule of property as per the plaint is R.S.174/5 measuring 1 acre 30 cents in Madurai District, Madurai North Taluk, Uthangudi Village.

4. A written statement was filed by the defendant wherein it was categorically stated that he did not offer to sell 1 acre 30 cents from R.S.No.174/5 or an equal extent of 1 acre 30 cents out of 4 acres 15 cents. The specific case of the defendant is that there was no agreement to sell a specified extent of land. In sum and substance, the contention of the defendant was that the so-called agreement was only in the draft stage which was corrected by the plaintiff and that a bare reading of the so-



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called agreement would disclose that the rate per cent was not decided and that it will have to be arrived subsequently and nowhere in the said draft agreement, an extent of 1 acre 30 cents was mentioned to be sold to the plaintiff. There was no consensus between the parties on the terms and conditions in the so-called agreement. The defendant would further go on to state that there was no date on the said agreement. It was contended by the defendant that in the subsequent negotiations between the parties which had happened on several dates in December 1983, the parties could not arrive at the value per cent or the extent and therefore, the matter was left at that.

5. In the Original Suit before the Sub-Court, the learned trial Judge held in favour of the plaintiff and decreed the suit to the effect that there was an agreement between the parties on 10.10.1983 for sale of 1 acre 30 cents and the defendant having received the entire sale consideration of Rs.1,00,000/-, was bound to execute the sale deed. As against this, appeal in A.S.No.600 of 1987 was filed before this Court by the defendant and in A.S.No.600 of 1987, the judgment and decree of the trial Court were confirmed and consequently, the defendant is now before this Court as appellant in this appeal under Clause 15 of the Letters Patent.

6. The contention of the appellant/defendant in the case is as follows:

There was no concluded agreement between the parties and assuming that there was such an agreement, the same is uncertain with regard to the extent of land to be sold, the amount to be paid per cent and the identity of the land to be sold. The whole case depends on the interpretation of Ex.A-2 agreement, which agreement is said to be dated 10.10.1983, in which the defendant alone has signed and there is no date on the so-called agreement. It is only in the plaint that the date 10.10.1983 is referred to. The specific case of the plaintiff that the defendant would sell 1 acre 30 cents in R.S.No.174/5 is also not specified in the said agreement and therefore, the so-called agreement is vague and unenforceable and in any event, the pleadings in the plaint are contrary to the terms contained in the so-called agreement Ex.A-2 said to be dated 10.10.1983. The findings of the Courts below are totally erroneous and on total misreading of the so-called agreement said to be dated 10.10.1983. According to learned counsel, it is not an agreement enforceable in law.

7. It is the further case of the appellant/defendant that there was no concluded contract enforceable under law. The learned single Judge misconstrued the so-called agreement Ex.A-2 and supplied facts and figures in order to uphold the decree in the suit. It is also contended that in a suit for specific performance of an agreement to sell immovable property, what is required to be gone into by the Courts is to interpret the terms of the agreement and there is no scope for considering extraneous materials to interpret the terms of the contract. Such an exercise has been done in this case by the Courts below, which is on the face of it, erroneous. Further irrelevant materials have been taken into consideration for the purpose of interpreting



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Ex.A-2, the so-called agreement. The reasoning given by the learned single Judge on the so-called agreement Ex.A-2 is perverse and unreasonable. It is further contended that the so-called agreement was only offer by the defendant to sell the land in future while reserving the question of fixing the rate per cent for the land, to a subsequent date and therefore, there was no concluded enforceable contract in order to lay a claim for specific performance.

8. It is further contended by the appellant/defendant that certain terms contained in Ex.A-2 were contingent on the defendant purchasing property from third party. None of the parties were aware of the value of the land that would be finally purchased. Therefore, there was no occasion for the defendant to agree for a specific price at Rs.769/- per cent and therefore, the reasoning of the Courts below that the value of the land to be sold per cent is Rs.769/-, is imaginary, arbitrary, illogical and incorrect.

9. The appellant/defendant also contended that the criminal complaint filed by the respondent/plaintiff to the Superintendent of Police after the disposal of the suit, which was brought to the knowledge of the learned single Judge, in C.M.P.No.1443 of 1991, the details of the police complaint was referred to, but materials relevant to the case were overlooked and the petition was rejected by the learned single Judge. However, if such document was considered, it would fairly go to establish the admission of the plaintiff that the so-called agreement was only given as a security and it was not entitled to be acted upon in the manner claimed by the plaintiff. In fine, learned counsel for the appellant/defendant would submit that so many inferences have been made by the learned single Judge to read into the agreement Ex.A-2 in the manner in which the plaintiff wanted it to be read.

10. It is also contended by the defendant that the fact that the plaintiff had not signed Ex.A-2 agreement would only go to show that so many conditions were left open to be decided in future and there was no conclusion of the said agreement. Further, when the plaintiff has not indicated in the suit notice or in the plaint or in the chief examination about the determination of price at Rs.769/- per cent, it is not fair on the part of the Courts below to fix the rate at Rs.769/- per cent based on the value of the other properties, which the Court is not called upon to do.

11. Learned counsel for the respondent/plaintiff on the other hand would contend that both the trial Court and the first appellate Court have given cogent reasons in support of the case of the respondent/plaintiff and therefore, this Court, sitting in appeal under Clause 15 of the Letters Patent, should not interfere with the questions of fact and law, especially when concurrent findings are rendered by the Courts below and would rely upon the case reported in 2005 (4) M.L.J. 24 (SC) = 2005 (6) SCC 243 (Umabai vs. Nilkanth Dhondiba Chavan).

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12. The present case primarily revolves around the interpretation of the agreement said to have been signed on



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10.10.1983 and marked as Ex.A-2 and signed by the appellant/defendant. Therefore, it will be most appropriate if the said document is considered before we proceed any further to adjudicate the issues involved in the present appeal. The said agreement reads as follows:

"I, P. Paneer Selvan, S/o. late S. Ponmuthu Nadar, 21. East Vadam Bokki Street, Madurai -1. have purchased 1 acre 90 cents of land which is locate at 92 Uthangudi Village, Madurai R.S.No.174/4 - 60 cents and 174/5 - 1 acre 30 cents from Mr.D.K. Dhurwasan S/O. late S. Krishnasamy Iyer Door No.94.A, East Veli Street, Madurai and from his younger brother Mr.D.K. Sundara Rao, Door No.172. East Veli Street, Madurai. And the document was registered on the date of 6-10-83 at Madurai Mahal register office. And I also intend to purchase 4 acres 15 cents of land which is located at the same area R.S.No.173/2 - 69 cents, 174/2 - 1 acres 31 cents, 175/1 - 74 cents, 174/3 -83 cents and 173/5 -58 cents from the above mentioned party. And I have taken a State Bank of India cheque No.A85 567448 dated 10-10-83 for rupees one lakh from SB A/C No.32881 of Mr.Baylis, 7/255, Alwar Nagar, Nagamalai, Madurai 19, assuring him that I will offer the lands worth the full amount of rupees one lakh at the rate we have mutually agreed upon on individual integrity, either from the purchased land 1 acre 90 cents or from the land which I intend to purchase i.e 4 acres 15 cents of land. If it is not possible to purchase the 4 acres 15 cents, the lands will be provided to Mr. Baylis only from the purchased land i.e. 1 acre 90 cents within a period of three months."

13. On a perusal of the so-called agreement, the following relevant factors are apparent:

(a) There is no mention anywhere in the said agreement that the appellant/defendant had agreed to sell 1 acre 30 cents of land and in particular in R.S.No.174/5.

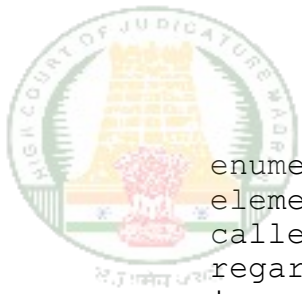
(b) The so-called agreement speaks only about the defendant offering a land worth Rs.1,00,000/-.

(c) In the so-called agreement, it is mentioned as, " .. at the rate we have mutually agreed upon on individual integrity .. " .

(d) The agreement does not state the rate per cent of the land sought to be sold.

(e) The extent of land offered for sale has not been specified.

14. The abovesaid factors give rise to certain vital questions as to the nature and intent of the agreement and the intention of the parties at the time of signing the agreement. Except stating that the land will be sold for a sum equivalent to Rs.1,00,000/-, the other details as claimed by the respondent/plaintiff in the plaint or in the legal notice, do not find a place in the agreement. Therefore, on the face of the so-called agreement, it is seen that the relevant factors as



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enumerated above are absent, which necessarily give rise to an element of doubt as to the intention of the parties to the so-called agreement. The said agreement has to be examined with regard to the plea of the appellant/defendant that the agreement is vague and also is bereft of material particulars and it is not a concluded agreement.

15. The plaintiff has to establish his case for specific performance of the contract of sale with regard to the terms as contained in the agreement. It is therefore necessary to find out whether the agreement relied upon by the plaintiff is a definite, specific and a concluded contract which can be specifically enforced.

16. In the present case, the only factor which apparently seems to be certain is that a sum of Rs.1,00,000/- was paid to the appellant/defendant. However, several other factors as enumerated above are silent in the said agreement. It therefore gives room for doubt regarding the conclusive nature of the agreement which is sought to be specifically enforced. Merely because the defendant had signed the so-called agreement, certain observations as to the conduct of the defendant cannot by itself give rise to a conclusion that the plaintiff's case would succeed. The plaintiff must establish that the suit for specific performance is maintainable based on the so-called agreement said to be dated 10.10.1983 and the agreement for sale is specifically for a specified rate and to sell a specific extent. The plaintiff has to succeed on the strength of his own case and not based on the weakness of the case, if any, on the part of the defendant.

17. Another contention on behalf of the respondent/plaintiff is that certain lands were purchased by the appellant/defendant at the rate of Rs.300/- Rs.400/- per cent at about the same time in the vicinity and also by the respondent/plaintiff for the same rate and therefore, there was a definite understanding that the defendant would sell 1 acre 30 cents of land for the abovesaid sum of Rs.1,00,000/-. Even as per this calculation, the rate per cent comes approximately to Rs.769/- and odd. If the rate as specified by the respondent/plaintiff is approximately Rs.300/- to Rs.400/- per cent and the extent of land for the abovesaid Rs.1,00,000/- would be 2.50 acres approximately. Hence, the extent of the land, namely 1.30 acres for the value of Rs.1,00,000/-, the rate per cent Rs.769/-, seems to be an inappropriate figure.

18. Yet another factor which would appear to be relevant for the purpose of determining the contention that no rate has been concluded, can be inferred from the following narration of events:

(i) As per the plaintiff's case, on 14.12.1983, the defendant refused to complete the transaction and, on 16.12.1983, notice was issued by the lawyer on behalf of the plaintiff. In such notice, it is indicated as if the defendant offered to sell 1 acre 30 cents either in the land bearing R.S.No.174/5 or an equal extent of land in 4 acres 15 cents to be purchased by the defendant. A reply dated 27.12.1983 to the aforesaid notice was sent by the defendant, wherein it was indicated:



"It is incorrect and mischievous to state as if there was an agreement to sell any specific extent for definite and ascertained consideration."

It is further indicated :

"... The draft of the alleged agreement, which was corrected by your own client himself, will clearly disclose that the rate per cent will have to be arrived at only subsequently after talk between the parties. Hence without ascertaining or arriving at the consideration or price for arriving at the extent for one lakh, as alleged by your client (but which is denied) unless the rate per cent is negotiated and fixed, the exact extent could not be fixed. It is significant that there is no whisper in your client's notice with regard to the fact whether the rate per cent was arrived at and much less at what rate."

In this reply, it is stated that the plaintiff had come to the defendant's shop on 15.12.1983 and the conversation between them had been tape recorded separately by both the parties. Subsequently, even though a reply to the aforesaid reply dated 27.12.1983 was sent by the Advocate of the plaintiff on 5.1.1984, the date of agreement was not mentioned, there was no denial that rate was not fixed as well as the extent and survey number.

(ii) Further, Ex.B-1, which is the corrected draft, on the basis of which Ex.A-2 is said to be typed out in a stamp paper and signed by the defendant shows that the draft, which had been typed out by the defendant, was admittedly corrected by the plaintiff in his own handwriting. It is significant to note that the draft initially contained the expression,

" I will offer the lands worth around rupees 2500/- per cent to the total value of rupees one lakh which I have taken".

Such expression was scored off, and in the plaintiff's handwriting it was corrected to read :

"I will offer the lands worth to the full amount of Rs.one lakh at rate we have mutually agreed upon on individual integrity."

As stated above, the corrected draft was typed on a stamp paper and signed by the defendant alone. Even though the rate is stated to have been mutually agreed upon, there is no material to come to a conclusion that in fact the parties had agreed upon to a particular rate and, if so, at what rate. If the rate had been concluded as stated emphatically, there was no explanation for not incorporating it in the so-called agreement.

19. It is therefore clear that there was no consensus on the rate per cent, as also the extent of land, which will clearly give rise to only one conclusion that the so-called agreement dated 10.10.1983 was not definite. On the contrary, the so-called agreement Ex.A-2 is vague and bereft of particulars and consequentially, an inconclusive document.



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20. Learned single Judge determined the following points for consideration:

"(i) Whether the agreement dated 10.10.1983 is a concluded contract or it is only an offer of sale made by the defendant?

(ii) Whether there was no mutual agreement between the parties in respect of price and extent to be sold by the defendant? and

(iii) Whether the plaintiff is entitled for specific performance of the contract or whether the plaintiff is entitled to return of advance amount paid by him treating it as borrowing done by the defendant?"

21. While discussing the above points, the learned single Judge observed in paragraph 8 of the judgment that, "the theory of loan even according to the defendant came only subsequently when according to him controversy arose with regard to fixation of price or rate for the land to be sold to the plaintiff." In paragraph 9 of the judgment, the learned single Judge observed that, "whether there was mutual agreement between the plaintiff and the defendant and whether there was consensus between the parties with regard to price and extent has to be gathered from the terms found in Ex.A-2 agreement and also from the evidence adduced by both sides." In paragraph 11 of the judgment, the learned single Judge would consider Ex.A-8 which is the sale deed in respect of 1.90 acres of land purchased prior to so-called Ex.A-2 agreement and the sale value in respect of Ex.A-8 is Rs.45,000/-. The learned single Judge placed reliance on this document to come to the conclusion that the amount of Rs.1,00,000/- was given by the plaintiff to the defendant only for the purchase of 1.30 acres of land. The learned single Judge further proceeds to hold that the plaintiff having parted with the huge amount, would not leave anything vague. Having observed that Ex.A-2 has to be considered for resolving the dispute in relation to the rate per cent and the land which is to be sold, the learned single Judge relies on Ex.A-8 to conclude that the plaintiff gave Rupees one lakh only for purchase of 1.30 acres and nothing was vague. This finding is not supported by Ex.A-2. What is offered is land in any one of the properties to be purchased, (i.e) to say, it could be even from the 4.15 acres to be bought subsequently. In such a case, the values will have to be determined in future only. Therefore, there is no reason to hold that the so-called agreement is complete and final in all respects.

22. In paragraph 12, the learned single Judge discusses Ex.B-1, the draft agreement with regard to certain corrections made (of which, we have already referred to) and hold that the defendant admits Ex.B-1 draft agreement as the first document and Ex.B-1 draft agreement was prepared in singular manner and thereafter, Ex.A-2 agreement was signed by the defendant alone and therefore, there was no difficulty in holding it as valid, because the plaintiff who has not signed the agreement, has accepted the same. The learned single Judge also rejects the contention that Ex.B-1 draft agreement was prepared by the plaintiff as not probable,



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because the defendant had admitted that the discussion with regard to the so-called agreement was held at his office and therefore, it was probable that it was typed by the defendant. The tenor of the draft agreement shows that it had been prepared by the defendant. Therefore, the defendant, having received the said sum of Rs.1,00,000/-, had offered that he would sell the land worth the said amount of Rs.1,00,000/- at the rate which they have mutually agreed upon on individual integrity.

23. In paragraph 13, as regards the endorsement "around Rs.2,500/- per cent to the total value of Rupees one lakh which I have taken" in the draft agreement, the learned single Judge came to the conclusion that there is nothing to show who scored the above endorsement and substituted the line, "the full amount of rupees one lakh at rate we have mutually agreed upon on individual integrity" in writing. The learned single Judge comes to the conclusion that the amount of Rs.2,500/- could not have been indicated by the plaintiff, because even as per the purchase document made prior to Ex.B-1 draft agreement, the land to the extent of 1.90 acres was purchased for a sale consideration of Rs.45,000/- and the rate comes to Rs.300/- to Rs.400/- per cent. Learned single Judge relies on certain documents relating to purchase of land by the plaintiff to come to the conclusion that the rate per cent at the relevant point of time was Rs.300/- to Rs.400/- per cent. Therefore, the learned single Judge rejected the defendant's claim that the rate put in Ex.B-1 draft agreement was of the plaintiff and came to the conclusion that it was the defendant who prepared the draft agreement giving the value of the land at Rs.2,500/-. However, he agrees that this amount has been struck-off. He therefore concludes that at that point of time, the parties would have discussed and agreed upon the price before the plaintiff could part with the sum of Rs.1,00,000/- which was needed by the defendant.

24. We are unable to accept the reasoning of the learned single Judge. Before the defendant signed the so-called agreement Ex.A-2, the controversy in preparing the draft Ex.B-1 wherein the typed version fixing the rate per cent at Rs.2,500/- was struck off and the substitution "rate mutually agreed upon on individual integrity" will clearly establish that there was no consensus between either parties about the rate per cent. It is because of the said reason, even the particular land to be sold was not specified in Ex.A-2. The reasoning of the learned Judge is contrary to facts. The inference drawn is not supported by Ex.A-2.

25. The learned single Judge in paragraph 15 of the judgment comes to the conclusion that there was discussion with regard to the rate of the property to be sold. No doubt, the figure Rs.2,500/- per cent was struck-off. But he would reject the claim of the defendant that the prevailing market rate was Rs.6,000/- per cent on the basis of contemporaneous sale deed and in the absence of any such proof, it can be inferred that it was the plaintiff who had struck-off the figure of Rs.2,500/- as it was very high and the agreement between the parties was not at that price level.



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26. In paragraph 16 of the judgment, the learned single Judge goes on to hold that, "the defendant seems to have persuaded the plaintiff that he must not stand in the way of his getting attractive price from the future prospective buyers and therefore it was agreed that the rate at which the parties have agreed need not be specifically mentioned in the agreement and this can be gathered from the recitals made because it is stated in Ex.A-2 that they have mutually agreed with regard to extent and price. There is evidence to show that the extent is 1.30 acres and the sale consideration is Rs.1,00,000/-."

27. The reasonings in paragraphs 15 and 16 are not supported by the tenor of Ex.A-2 or in any correspondence prior to the so-called agreement. What price the defendant will sell his land cannot be inferred by the Court, because in transaction of this nature, it is for the parties to determine what extent of land will be bought and sold and at what price. If the parties have mutually agreed to a price, nothing prevented them from putting it on paper. After all, it is between the two parties. On the contrary, the price Rs.2,500/- per cent has been consciously struck-off. Therefore, this finding is not supported by Ex.A-2.

28. In paragraph 17 of the judgment, the learned single Judge comes to the conclusion that since the full amount of Rs.1,00,000/- has already been paid and in view of the agreement between the parties with regard to the rate and extent, it is not ambiguous and he comes to the conclusion that there was absolutely nothing left in vagueness and the extent of the land that could be sold and the rate at which to be sold, are mutually agreed upon by the parties and the learned single Judge would rely upon Ex.A-2. Learned single Judge accepted the plaintiff's contention that the mutual agreement between the parties was to obtain the sale deed for 1.30 acres in either of the lands for a sum of Rs.1,00,000/- and the rate per cent being Rs.769/-. In this connection, the learned single Judge holds that the defendant cannot make a better claim as the property purchased a month prior to the agreement was only at the rate of Rs.300/- per cent. There is also a comparison on the ground that the property purchased under Exs.A-10 to A-12 is same as that of the suit property with regard to location, soil etc. The learned single Judge comes to the conclusion that the defendant is in real estate business and he cannot contend that the profit of 100% is much low and not a good bargain and also held that the defendant had to come to a very good bargain and therefore, it cannot be said that there was no agreement between parties regarding the price and further comes to the conclusion that the parties were conscious of the rate even though the fact that the price has been indicated in the draft agreement Ex.B-1 was struck-off thereafter. The learned single Judge also concludes that there was no possibility of deciding the rate and extent for a future date. These observations are totally unsupported on the face of Ex.A-2. At the risk of repetition, there is nothing in Ex.A-2 to show that 1.30 acres will be sold and there is no reference to rate per cent at the rate of Rs.769/-. There is no indication that the contemporaneous rates will be the benchmark. If the rate was already decided, there was no necessity to strike off Rs.2,500/- per cent and substitute it by the figure Rs.769/-



as has been held by the learned Judge. The answer is obvious. The rate could not be finalised and therefore, it was left to the future.

29. In paragraph 18 of the judgment, the learned single Judge has concluded as follows:

"18. The evidence has established that parties have discussed, negotiated and thought over the rate at which the land must be sold and therefore the plaintiff only intended to pay the entire consideration of Rs.1,00,000/- agreeing to purchase 1.30 acres which works out to Rs.769/- per cent which is also a very good bargain from the point of view of the defendants. It does not lie in the mouth of the defendant to say that the plaintiff is trying to grab the property for a cheap or throw away price. It is the defendant who is in real estate business who wants to exploit and who wants to go back on the agreement because subsequently there is great demand for house sites and he thinks that he can ignore Ex.A-2 and negotiate still for higher amount with third parties. It is only because of the greed of the real estate broker, the contract could not be completed and the plaintiff has been forced to file the suit for specific performance."

30. In paragraph 19, the learned single Judge held as follows:

" .. At the time when Ex.A-2 agreement was entered into, DW-1 wanted to purchase 4.15 acres in the adjacent area and when it was suggested to him that he has agreed to execute the sale deed for an extent of 1.30 acres because the plaintiff has given him Rs.1,00,000/- and the money was required by him to take the sale deed for 4.15 acres. ... "

31. In paragraph 20, the learned single Judge held as follows:

"20. In fact the defendant has committed himself to the terms used in Ex.A-2 and it was not a slip or a word put inadvertently because DW-1 admits that he went through the entire agreement Ex.A-2 and only on being satisfied he signed the same. It is not the case of DW-1 that he was persuaded to sign Ex.A-2 even though he knew and insisted that there was no agreement with regard to price of the land. But for the mutual agreement arrived at between the parties as contended by the plaintiff, the



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defendant would not have agreed for the wordings mutually agreed upon the rate and swearing upon his integrity to maintain the same rate which are found in Ex.A-2 agreement. Therefore, DW-1 who is a dealer in real estate subsequently became greedy after obtaining the money which he needed and now wants to wriggle out of the agreement and that is the reason why he is trying to make out a case that Ex.A-2 agreement is vitiated for want of mutuality. "

The reasons given by the learned single Judge in the foregoing paragraphs are alien to the issue in this case and therefore, are unacceptable. The reasonings are based on conjectures and surmises. The reason for the defendant signing the document Ex.A-2 and the plaintiff not signing is explained by the plaintiff himself who wanted some record of the transaction with regard to payment. May be, it is for purchase of land, but since the parties could not decide on the extent of land, the survey number of the land and the rate per cent, it was left open to be decided in future. The words 'mutually agreed' and 'integrity' are not barometers to fix the value per cent. What was mutually agreed is for the parties to establish and not for the Court to infer.

32. In conclusion, in paragraph 35, the learned single Judge, while rejecting the various decisions cited by the defendant, held as follows:

"35. On the facts of the present case, I have come to the conclusion that the parties have agreed with regard to price and rate at which the lands to be sold, that the defendant has actually agreed upon to sell 1.30 acres of land to the plaintiff for a consideration of Rs.1,00,000/- which has been also paid to the defendant on that date itself. Therefore, the rulings cited above on the side of the defendant are not at all applicable to the present case and those are the case where the agreement which came up for decision revealed that the parties have not arrived at a mutual agreement and something was left to be decided in future and therefore in all these cases specific performance was refused."

33. While interpreting Ex.A-2 agreement, the learned single Judge held in paragraph 38 as follows:

"38. As discussed above, a reading of Ex.A-2 agreement and the evidence available in this case has clearly established that both the plaintiff and the defendant have agreed with regard to selling of suit property having an extent of 1.30 acres for the exact price of Rs.1,00,000/- and therefore the defendant



cannot be allowed to wriggle out of the contract pointing out the absence of specific mention with regard to extent of the land conveyed and the rate."

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There is absolutely no material to come to the conclusion in paragraphs 35 and 38 referred to above. We have indicated how Ex.A-2 is vague and bereft of relevant materials.

34. The learned single Judge upheld the judgment and decree of the trial Court. Most of the findings arrived at by the learned single Judge apparently are based on extraneous factors and conclusions which are contrary and irrelevant to the document in issue, namely Ex.A-2 the alleged agreement dated 10.10.1983. On a clear reading of Ex.A-2 dated 10.10.1983, it is seen that there is no reference to the extent of 1.30 acres or to the rate at Rs.769/- per cent. The reasonings of the learned single Judge which have been extracted above, and our reasoning on the findings of the learned single Judge, very clearly show that the learned single Judge proceeded on the basis of certain contemporaneous sale value of the property to indicate that the extent of land to be sold was 1.30 acres and the rate was Rs.769/- per cent. On the face of Ex.A-2 agreement, there is nothing to support such a view. It is for the first time in the notice, reference was made to an extent of 1.30 acres. In the notice also, there is no reference to the so-called agreement dated 10.10.1983. Even in the rejoinder dated 5.1.1984, there are no details as to the rate per cent of land which is sought to be purchased and there was no specific mention that 1 acre 30 cents was agreed to be sold at a particular rate.

35. When the so-called agreement Ex.A-2 dated 10.10.1983 is vague and bereft of material particulars as regards the extent of land sought to be sold and the rate per cent, it will not be fair to read something more into the agreement as to what could have been the rate that the parties would have agreed to. The Court is not called upon to substitute its views at what rate the transaction should be concluded and what extent of land the parties have agreed to be buy and sell. In the absence of any clear indication on the face of the so-called agreement said to be dated 10.10.1983, it will be an exercise in vain to read something into the document in issue.

36. The decision of a Division Bench of the Kerala High Court reported in AIR 1966 Kerala 311 (Nair Service Society vs. R.M.Palat) clearly supports the view that in order to enable the Court to determine the terms of a contract in a suit for specific performance, the terms of the contract should be clear, definite, certain and complete and it should be free from doubt, vagueness and ambiguity so as to leave nothing to conjecture or to be supplied by Court. In this case, the findings are based on inferences which the Court was not required to do.

37. Further, in a decision of a Division Bench of this Court reported in 1988 (2) L.W. 462 (M.Suryaprakasha Gupta vs. T.S.Muthuswami Iyer and others), it was held that no Court can



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ever bring about a contract between the parties, which agreement the parties themselves have not contemplated, and it is by reason of the 'consensus ad idem' between the parties, the agreement comes into force and only such an agreement is capable of enforcement in a Court of law by way of specific performance. It is therefore clear that the Court cannot interpose itself and supply what is not found in the agreement.

38. The findings of the trial Court as affirmed by the learned single Judges, give no room for doubt that the conclusions arrived at by the Courts do not form part of the so-called agreement Ex.A-2 said to be dated 10.10.1983 and we have given our reasons for rejecting such a conclusion.

39. Learned counsel for the respondent/plaintiff would rely upon the judgment reported in AIR 1959 SC 639 (Damodhar Tukaram Mangalmurti and others vs. State of Bombay), to support the view of the Courts below. In this case, the original lease was for a period of 30 years with a provision for renewal for another 30 years with the condition that the rent was as provided in the lease deed "subject to such fair and equitable enhancement as the lessor shall determine". The appeal before the High Court was referred to a Division Bench and the Division Bench headed by the Chief Justice of Bombay High Court, was of the opinion that the Civil Court had no jurisdiction to determine what would be the fair and equitable rent for the purpose of giving effect to the clause of renewal, whereas the other learned Judge came to the conclusion that the Court could determine the fair and equitable rent so that the clause of renewal can be given effect to. On such difference of opinion, the matter was referred to a third Judge, who agreed with the views of the learned Chief Justice that the Civil Court had no jurisdiction to determine the fair and equitable rent. In appeal, the majority view observed :-

"8. We think that the clause should be read as a whole and every offer should be made to give effect to all the words used therein. The relevant portion of the clause states- "such fair and equitable enhancement as the lessor shall determine". If the construction is that whatever the lessor determines as fair and equitable enhancement must be treated as binding on the lessee, then the words 'fair and equitable' are not given the meaning and sense which they have according to the ordinary acceptance of those words.

'Fair' and 'equitable' mean fair and equitable in fact, and not what the lessor subjectively considered to be fair and equitable. The words 'fair' and equitable both mean 'just or unbiased' (see the Concise Oxford Dictionary, 4th Edn. p.426 and p.402). If the intention was to leave the enhancement to the subjective determination of the lessor, the clause would have more aptly said- 'such enhancement as the lessor shall determine'. We consider that the words 'fair and equitable' must be given their due meaning and proper effect. The question then asked is - what meaning is to be given to the words 'such... as the lessor shall



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determine'. It is indeed true that these words constitute an adjectival clause to the expression 'fair and equitable enhancement', but we consider that the meaning of the adjectival clause is merely this: the lessor must first determine what it considers to be fair and equitable enhancement; but if in fact it is not so, it is open to the lessee to ask the Court to determine what is fair and equitable enhancement. We do not think that on a proper construction of the clause, the intention was to oust the jurisdiction of the Court and make the determination of the enhancement by the lessor final and binding on the lessee. We think that the conclusion at which Mudholkar J, arrived on this point was correct, though not exactly for the reasons given by him.

(9) If the construction stated above is the correct construction, then no further difficulty is presented by cl.III. The learned Judges of the High Court unanimously expressed the view that the lease was not void for uncertainty, and in that view we concur. There is authority in support of the view that a covenant to settle land 'at a proper rate' or 'upon such terms and conditions as should be judged reasonable' is not void for uncertainty: see *New Beerhoom Coal Co. Ltd. v. Boloram Mahata*, 7 Ind App 107, and *Secretary of State for India in Council v. Volkart Bros.*, ILR 50 Mad 595 (AIR 1927 Mad 513). In the former case, Sir Barnes Peacock who delivered the judgment of their Lordships said:

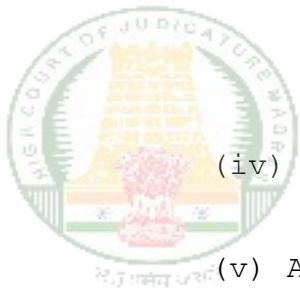
"The High Court affirmed the decision, but not for reasons which their Lordships consider to be correct. They affirmed it upon the ground that it was impossible to determine what was a reasonable rate. Their Lordships cannot think that in the present case the Court, upon a proper inquiry, would have been unable to determine it. There might have been considerable difficulty in fixing the rate; but difficulties often occur in determining what is a reasonable price or a reasonable rate, or in fixing the amount of damages which a man has sustained under particular circumstances. These are difficulties which the Court is bound to overcome."

Counsel for the respondent/plaintiff referred to several decisions of different High Courts, including the decisions reported in

(i) AIR 1990 Kerala 198 (*Kandamath Cine Enterprises (Pvt.) Ltd. vs. John Philipose*),

(ii) AIR 1967 Gujarat 81 (*Bai Mangu vs. Bai Vijli and others*),

(iii) AIR 1966 Kerala 311 (*Nair Service Society vs. R.M.Palat*),



(iv) AIR 1984 Calcutta 153 (Remington Rand of India Ltd. vs. Sohanlal) and

(v) AIR 1951 Orissa 291 (Rajkishor vs. Banabehari).

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The Division Bench decision of the Orissa High Court relied upon in AIR 1951 Orissa 291 (cited supra) relates to a case of specific performance in respect of an agreement of sale, while other decisions relate to interpretation of renewal clauses of the lease agreement, where the amount had not been fixed. In the said decision of the Orissa High Court, there was an agreement to sell a property but the specific sum for which the property to be sold had not been indicated. Even though the two learned Judges gave their separate opinions, both the Judges more or less agreed on the point of law to the effect that in the absence of any specific amount, the court itself could fix a reasonable amount as consideration so that the intention of the parties to complete the sale transaction could be enforced. The relevant portion of the observations made by Das, J (as His Lordship then was) in the Orissa High Court decision reads as follows:

"9. ... A contract may fix the manner in which the price is to be determined or it may stipulate for a fair price being fixed & it is nevertheless binding, though the price is not specifically ascertained in the contract itself. (See Fry on Specific Performance, p.165, 6th Edn.). Of course it is not within the province of a Ct. to make a contract for the parties. If the parties have no consensus ad idem with reference to any essential term of the contract, then there is no binding contract at all. But if the parties, having agreed that there should be a binding engagement between them for sale & purchase, which is definite in every other respect, relegate the question of price to a secondary position & if they agree to this extent, namely, that the sale shall be at a reasonable price, such a contract is valid & binding since the reasonableness of the price is one that can be determined by the Ct. if the parties themselves do not ultimately agree about it. Under S.29, Contract Act, it is only agreements the meaning of which is not certain or is not capable of being made certain that are void. A contract to sell at a reasonable price is one that can be made certain within the meaning of this section, that is by fixation of the price by the Ct. on the standard of reasonableness in case the parties do not ultimately agree. This principle has been laid down by the House of Lords in Hillas & Co., v. Arcos Ltd. (1932) 147 L.T. 503 followed in Folley v. Classique Coaches Ltd., (1934)-2 K.B. 1: (103 L.J.K.B. 550). Also vide (1941) A.C. 251. This last case shows where the line is to be drawn. As observed by Lord Wright at p.272 of (1941) A.C. 251:

"The Ct. could not indeed make a contract for the parties or go outside the words they had used, except in so far as there were appropriate implications of law, as for instance, the



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implications of what was just & reasonable, where the contractual intention was clear, but the contract was silent in some detail which the Ct. could thus fill in."

It is also well settled that such a binding contract for sale at a fair price is capable of specific performance. (See Secy. of State v. Volkart Bros, 50 Mad.595 : (A.I.R. (14) 1927 Mad,. 513).) Similar considerations apply to the non-fixing of the time of performance."
(emphasis supplied)

The abovesaid case stands on a slightly different footing in comparison to the present case.

40. In this case, it is no doubt true that the sum of Rs.1,00,000/- paid by the plaintiff, has been accepted by the defendant. However, before proceeding to conclude the agreement, difficulty had arisen with regard to the value (i.e) rate per cent of the property to be sold and the extent of the land. The defendant offered one among several properties intended to be purchased at a rate to be mutually agreed by striking off Rs.2,500/- per cent indicated. The agreement does not specify any particular property that is to be sold. On the contrary, Ex.A-2 agreement clearly indicates that from and out of the property to be purchased or acquired in future, property worth Rs.1,00,000/- is to be conveyed to the plaintiff. There is no material to indicate that the parties had agreed that particular land in particular survey number will be sold at particular rate per cent. It is not possible to infer something in favour of the plaintiff to decide that the extent of land to be sold is 1.30 acres, when the value per cent has not been indicated. We have also held that the basis of fixing the rate at Rs.769/- per cent is also not clear when according to the plaintiff, the contemporaneous value was Rs.300/- to Rs.400/- per cent. It is clear in the present case that there is no rate per cent indicated and there is no identity of the property which is sought to be sold. There is no indication that parties agree for a reasonable rate as in the cases referred to above. Therefore, it is rather difficult to accept that Ex.A-2 agreement can be specifically enforced as a definite contract. We are unable to come to such a conclusion. On the contrary, the so-called agreement Ex.A-2 is vague and indefinite for the various reasons already set out above. Therefore, the conclusion of the learned single Judge and the trial Court is based on total misreading of the so-called agreement Ex.A-2 and we have given our reasons for the same earlier.

41. In fine, we have no hesitation to hold that Ex.A-2 agreement said to be dated 10.10.1983 is no agreement at all. The learned single Judge has gone into the value of the property that was purchased by the plaintiff and the defendant with some other third parties, to come to the conclusion that contemporaneous price of the land was about Rs.300/- to Rs.400/- per cent and therefore, the learned single Judge would come to the conclusion that the rate per cent in the present transaction would be Rs.769/- per cent, which transaction for sale and purchase of the land is totally independent transaction between the parties



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thereto. The transaction between third parties cannot form the basis to arrive at a particular value in respect of the property in issue, more so, when the parties to the agreement could not arrive at a figure. The Court ought not come to the rescue of the plaintiff in an issue he could not decide. It is only for that reason, the tenor of the agreement was changed to include the following sentence, "... we have mutually agreed upon on individual integrity...". This itself would go to show that the parties themselves could not agree upon the price and it was left to be decided later. The Court cannot substitute its view and come to the conclusion as to what actually would be the price. Such an exercise is totally unwarranted and uncalled for.

42. In this case, the Court was called upon to interpret the terms of the agreement in a suit for specific performance. The Court has to go strictly according to the terms and conditions contained in the agreement and not beyond. This is more true because several attendant circumstances have been brought to the notice of the Court like prior agreement, tape-record of the talks, criminal complaint, etc., to show that the parties have taken different stand at different point of time. Even as on 15.12.1983, from the pleadings of either parties, it will be clear that the question of fixing the rate per cent and the land which is sought to be sold, are not concluded, and that is why, several talks were going on between the plaintiff and the defendant and it became inconclusive, which led to the filing of the present suit. In such view of the matter, it will not be appropriate for a Court to add more confusion to the issue by substituting its view in interpreting the agreement. The inconclusive and vague agreement should have been left at that. In such view of the matter, we find that the various reasons given by the learned single Judge and the Courts below are based on misreading and wrong appreciation of the relevant facts and are totally untenable. Therefore, it calls for interference. We therefore hold that the plaintiff cannot seek specific performance of contract for the above stated reasons.

43. We are however aware that the scope of this Court in the Letters Patent Appeal is limited as has been held by the Apex Court in the case of Umabai vs. Nilkanth Dhondiba Chavan (2005 (4) MLJ 24 (SC) = 2005 (6) SCC 243) and the relevant portion of the same reads as follows:

"52. It may be, as has been held in Asha Devi (1974 (2) SCC 492) that the power of the appellate court in intra-court appeal is not exactly the same as contained in Section 100 of the Code of Civil Procedure but it is also well known that entertain of a letters patent appeal is discretionary and normally the Division Bench would not, unless there exist cogent reasons, differ from a finding of fact arrived at by the learned Single Judge. Even as noticed hereinbefore, a court of first appeal which is the final court of appeal on fact may have to exercise some amount of restraint."



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On examining the various reasons given by the learned single Judge to uphold the judgment and decree of the trial Court, we find that the Courts below have misread the so-called Ex.A-2 agreement and substituted their views to come to the conclusion as to the extent of the land and the rate per cent. Since we have already held that the conclusion of the Courts below is based on a total misreading of Ex.A-2 agreement, which is the core document in the present case, we have no hesitation to hold that the reasoning of the Courts below are contrary to Ex.A-2 agreement and therefore, it is perverse and we therefore feel that the judgment and decree of the learned single Judge confirming the judgment and decree of the trial Court, has to be interfered with.

44. Insofar as the particulars of the claim made in the plaint is concerned, in addition to the sum of Rs.1,00,000/-, the plaintiff has claimed interest at 18% from 10.10.1983 to 17.4.1984 which comes to Rs.9,419.18. Clause (b) of the prayer made in the plaint reads as follows:

"b. Or in the alternative directing the defendant to pay the sum of Rs.109419.18 with subsequent interest on Rs.1,00,000/- till the date of payment."

Since this Court has come to the conclusion that the prayer for specific performance of the contract is not maintainable, there should be no difficulty in granting the alternative relief that has been prayed for refund of the amount paid by the plaintiff. In the plaint, interest @ 18% from the date of payment till the filing of the suit was claimed by the plaintiff. The defendant has indicated that he had borrowed the said sum of Rs.1,00,000/- in order to deal in real estate business and therefore, there is no difficulty to hold that it was a commercial transaction and the claim for interest @ 18% from the date of payment till the date of filing of the suit is proper and the plaintiff is entitled to the same.

45. It is stated that by learned counsel for the defendant that the amount of Rs.1,00,000/- has been subsequently deposited and the same is earning interest. The plaintiff is also entitled to the interest at 18% per annum on the said sum of Rs.1,09,419.18 till the date of payment.

46. In the course of arguments, learned counsel for the respondent/plaintiff would rely upon the following judgments:

- (i) 1996 (4) SCC 593 (Kanshi Ram vs. Om Prakash Jawal)
- (ii) AIR 1999 SC 2309 (K.Narendra vs. Riviera Apartments (P) Ltd.)
- (iii) AIR 2002 SC 2290 (Nirmala Anand vs. Advent Corpn. Pvt. Ltd.)

The contention of the learned counsel for the respondent/plaintiff is that in the event of the Court not agreeing to uphold the judgment and decree of the Courts below and the specific performance of the agreement is not granted, the Courts should award compensation in terms of Section 21 of the Specific Relief Act, 1963.



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47. In this case, even according to the prayer in the plaint, only two contingencies are envisaged. Either the suit for specific performance shall be decreed or the amount shall be refunded with interest.

48. Section 21(5) of the Specific Relief Act reads as follows:

"No compensation shall be awarded under this section unless the plaintiff has claimed such compensation in his plaint."

49. In this case, there is no claim for payment of compensation as envisaged under Section 21 of the Specific Relief Act. Under Section 21(1), the plaintiff may claim compensation for the breach of contract either in addition or in substitution of specific performance of the contract. Under Section 21(2), if the Court decides that specific performance ought not to be granted, but there has been breach of contract by the defendant, it shall award compensation. Under Section 21(3), the Court may also award compensation even where specific performance is granted. Under Section 21(4), while deciding the question of compensation, the Court shall be guided by the principles specified in Section 73 of the Indian Contract Act. In other words, the extent of damage is required to be assessed. Under Section 21(5), no compensation shall be awarded unless the plaintiff has claimed such compensation in his plaint. It is of course true that under the proviso to Section 21(5), the plaintiff can seek for payment of compensation by way of amendment. However, there is no such prayer for amendment in the present case. Moreover, the prayer for specific performance is being denied because of the uncertainty in the agreement itself or because of the vagueness.

50. In such view of the matter, and more particularly when no compensation has been claimed, it may not be appropriate to award any compensation. However, the plaintiff is entitled to pendente lite and future interest. This aspect is covered by Section 34 of the Code of Civil Procedure.

51. Under Section 34(1), the Court has power to grant pendente lite as well as future interest. So far as pendente lite interest is concerned, the Court can award interest at such rate as the Court deems reasonable on the principal sum adjudged. Under the later part of Section 34(1), the court is entitled to grant post-decree interest at such rate not exceeding 6%. However, the proviso indicates that where the liability had arisen out of a commercial transaction, the rate of such further interest may exceed 6% but shall not exceed the contractual rate of interest or the rate at which moneys are lent or advanced by the nationalised banks in relation to commercial transactions.

52. Having regard to the nature of the transaction, which obviously is commercial in nature, we are of the opinion that the plaintiff is entitled to pendente lite and future interest on a



sum of Rs.1,00,000/- at the rate of 15% per annum. The pendent lite interest shall be calculated from the date of filing of the suit till the date of disposal of the suit by the trial court and the future interest shall be calculated thereafter.

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53. The trial Court has decreed the suit with costs. Learned single Judge of this Court while confirming the judgment and decree of the trial Court for the suit for specific performance, dismissed the appeal without costs. Therefore, the judgment and decree of the trial Court regarding costs remain.

54. In view of the facts and circumstances, we set aside the judgment and decree of the Courts below and modify the same to the effect that the respondent/plaintiff shall be entitled to a decree in terms of clause (b) of the prayer in the plaint. The respondent/plaintiff is also entitled to the costs of the trial Court as directed by the trial Court.

55. The Letters Patent Appeal is allowed to the above extent and the judgment and decree of the Courts below are modified. The parties shall bear their own costs in this appeal.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.
(P)

cs

To

1. Subordinate Judge, Madurai.

2. Section Officer,
V.R. Section, High Court, Madras.

2 ccs to Mr.K.V.Ananthakrishnan, Advocate, Sr. 20470

1 cc to Mr.T.R.Rajaraman, Advocate, Sr. 20163

2 ccs t Mrs.Chitra Sampath, Advocate, Sr. 20177

L.P.A.No.21 of 2000

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